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December 13, 1996

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Mr. William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

Re: Ex Parte - CC Docket No. 96-149

Dear Mr. Caton:

This letter responds to two recent ex parte letters filed on behalf of Bell companies in the captioned proceeding.[1] In these letters, the Bell companies continue to advance claims, assertedly pursuant to Section 271(e)(1) of the Act, to impose unnecessary, inefficient, anti-consumer and anti-competitive regulatory requirements on interexchange carriers and customers.

Specifically, the recent Bell company ex parte letters contend that the joint marketing restriction of Section 271(e)(1) should be construed to raise even higher barriers to interexchange carrier entry into the local market. For instance, the Bell companies ask the Commission to require that larger interexchange carriers market interexchange services and resold local exchange services only in separate advertisements, and through separate marketing and "sales channels" that use separate personnel. Even then, the Bell companies would preclude interexchange carriers from transferring customers among separate interexchange and local services representatives,

[1] Letter to Christopher J. Wright, Deputy General Counsel, FCC, from Robert L. Pettit, Wiley, Rein & Fielding, dated December 6, 1996 ("Pettit Letter"); Letter to Christopher J. Wright, Deputy General Counsel, FCC, from Michael K. Kellogg, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., dated December 9, 1996 ("Kellogg Letter").

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and would require interexchange carriers and their customers to initiate entirely separate calls concerning local and interexchange services, even when a customer seeks to discuss both services on a single call. While requiring interexchange carriers to "hang up" on their customers might serve the Bell companies' business interests, it is not required by the Act. To the contrary, it would raise costs, burden customers, and impede the very local entry that the Act and the Commission seek to foster.

As a preliminary matter, the concerns raised by the Bell companies are ironic and wrong. They are premised on the notion that, absent the additional regulatory hurdles they seek to impose, the Bell companies will be at some marketplace disadvantage with respect to interexchange carriers in offering packages of telecommunications services. This completely ignores that it is the Bell companies that hold the overwhelming marketplace advantage, deriving from their historical and continuing local exchange monopolies. The overriding purpose of the Telecommunications Act of 1996 was to open local markets to competition, and to erode those monopolies. Every provision of the Act should be read in light of this fundamental goal.

The Section 271(e)(1) joint marketing restriction needs to be construed in this context. Congress clearly allowed the joint marketing of interLATA and local services of all kinds other than through the resale of Bell company services pursuant to Section 251(c)(4). This narrow restriction -- apparently borne of some sense of fairness in light of the continuing interLATA injunction of Section 271, and the incorrectly perceived ease of local services resale -- has no statutory or public interest relationship to the Section 272 structural safeguards to be imposed on the Bell companies, and should not give rise to the separation requirements advanced by those companies.

As the Commission has found, and the courts have consistently affirmed, joint marketing and "one-stop shopping" ordinarily benefit consumers and enhance competition.[2] By contrast, the rules proposed by the Bell companies will only increase costs, frustrate consumers, and slow competitive entry. Indeed, there is already evidence that the Bell companies will use the joint marketing language of Section 271(e)(1) improperly to chill competitive entry.[3] The Commission should not allow this to happen.

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[2] E.g., SBC Communications Inc. v. Federal Communications Commission, 56 F.3d 1484, 1492-94 (1995), affirming the Commission's findings concerning the consumer and competitive benefits of joint marketing and one-stop shopping.

[3] For instance, Ameritech recently filed an informal complaint against MCI for "prematurely jointly marketing interLATA services with exchange services" that "Ameritech believes MCI will serve" in many cases using the resold local exchange services of Ameritech (emphasis added). See Notice of Informal Complaint, IC-97-00440, Consumer Protection Branch, Enforcement Division, Common Carrier Bureau, FCC, Letter to John B. Muleta, Chief, Enforcement Division, FCC, from Gary L. Phillips, Ameritech, dated November 25, 1996; id.,

By its terms, Section 271(e)(1) provides only that, under specified circumstances, larger interexchange carriers "may not jointly market" interLATA services with local exchange services obtained from a Bell company pursuant to Section 251(c)(4). It does not explicitly extend to advertising, and appears to preclude nothing more than "price bundling" -- i.e., the offering to customers of interexchange and resold local services at a price that would not be available without the purchase of both. Indeed, notwithstanding the current filing by Pacific's outside counsel before the Commission, Pacific's General Counsel previously advised the California Public Utilities Commission that Section 271(e)(1) prohibited nothing more than such bundling.[4] By contrast, where Congress sought to include "advertising" as part of a joint marketing restriction, it has done so explicitly, as in Section 274(c)(1) of the Act.[5]

Construing Section 271(e)(1) to include advertising would, moreover, raise difficult issues of practical application. For instance, interexchange carriers are free, under the Act, jointly to advertise interLATA services and local service in GTE territories, which are adjacent to, and generally in the same media markets as, Bell company territories. Interexchange carriers are also free to jointly advertise in Bell company territory interexchange and local services that are not provided through resale.

Contrary to the core pro-competitive purpose of the Act, Pacific would altogether ban such advertising, if it would "reasonably be expected to reach a substantial number of customers" that would receive service through the resale of Bell company services.[6] For his part, Mr. Kellogg (p. 4) would require some disclaimer about the availability of both services.[7] These proposals would undermine interexchange carrier efforts to enter the local market, even in areas where an ILEC is

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Letter to Reed E. Hundt, Chairman, FCC, from Gary R. Lytle, Ameritech, dated October, 30, 1996, p.2.

4 See Letter to P. Gregory Conlon, President, California Public Utilities Commission, from Richard W. Odgers, Pacific Telesis Group, dated May 9, 1996. Mr. Odgers letter is attached.

5 Pacific's outside counsel also advances (pp. 4-5) a seriously flawed analysis to support the constitutionality of the advertising ban that he proposes. Most notably, that filing maintains (p.4) that the advertising ban is sustainable because "the underlying activities are unlawful." But there is no dispute that the larger interexchange carriers may lawfully provide both interexchange and resold local services. At bottom, Pacific wants the FCC to restrain interexchange carriers from advertising what they may lawfully offer.

6 See Proposed Rule, attached to the Pettit Letter.

7 The notion of a disclaimer is particularly puzzling. Because AT&T can and will provide interLATA and resold local services, there would appear to be nothing to disclaim in an advertisement that identified the availability of both from AT&T, even if that advertisement reaches a customer served with resold Bell company services.

already providing interLATA services, and in instances where Congress chose not to restrict joint marketing.

There is also no reasonable way, or basis, to construe Section 271(e)(1) to require the structural separation that the Bell companies advance. These proposals would increase local entry costs, and substantially impede local entry by denying interexchange carriers the ability to use existing sales channels and common personnel. Yet nothing in the Act suggests that the competitive interexchange industry should be required to establish separate "marketing and sales channels," including separate marketing agents and separate personnel, for the sale of interexchange and resold local services. Even if, as Mr. Kellogg maintains (p. 3), Section 271(e)(1) was intended to limit the ability of interexchange carriers to "offer one-stop shopping relying on resold local services," nothing in the Act would deny interexchange carriers these other efficiencies.

Thus, while Mr. Kellogg explicitly asserts (p. 4) that interexchange carriers should be denied efficiencies "in terms of sales personnel and advertising expenses," he cannot, and does not, rely on the Act for these restrictions. To the contrary, he argues (pp. 2-3) that the Commission's "historical precedents should inform the Commission's reading of the joint marketing prohibition." Those precedents, however, cut precisely against Mr. Kellogg's position. While Mr. Kellogg maintains that the Commission has historically interpreted joint marketing restrictions as barring the use of a single sales force, he relies on precedents concerning the structural separation requirements of the Computer Inquiry proceedings. Those requirements, like those explicitly imposed on the Bell companies by Section 272 of the Act, clearly required structural separation to protect against cost misallocations and other potential bottleneck abuses. Separation of marketing personnel and functions was required as part of the overall structural separation mandated in those proceedings, and not because the term joint marketing, warrants such separation.

Even if the Commission were to construe Section 271(e)(1) to prohibit more than the "price bundling" of interexchange and resold local services, it need not impose the extreme and costly separations requirements advanced by the Bell companies. A single sales representative could, for example, be required to limit his or her discussion to either interexchange or resold local services, discussing the other only with the customer's consent, and only after concluding discussion of the first service.[8] External sales channels could similarly avoid the joint offering of interexchange and resold local services.[9] If deemed appropriate, the Commission

8 The representative could also refrain from discussing the other service except in response to a customer inquiry, and then discuss it only after explaining that legal requirements preclude discussing both services jointly, and concluding discussion of one before discussing the other.

9 The Bell companies attempt to preclude interexchange carriers from transferring customers to other service representatives is particularly outlandish. Even Mr. Kellogg acknowledges (pp. 2-

could, subject to carrier comment, establish specific guidelines for interexchange carriers to follow in establishing the methods, procedures, and scripts that the carriers would utilize in these regards. To deny use of those personnel and services, however, would seriously undercut local entry without basis in the Act, or corresponding benefits to consumers or competition.

Two copies of this Notice are being submitted to the Secretary of the Commission in accordance with Section 1.1206(a)(1) of the Commission's rules.

Sincerely,

cc:

Regina Keeney
Richard Metzger
Richard Welch
Marjorie Bertman
Radhika Karmarkar
Linda Kinney
Carol Mattey
Debra Weiner
Christopher Wright

Lauren Belvin
James Coltharp
James Casserly
Daniel Gonzalez
John Nakahata

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3) that, after divestiture, under the strict structural separation requirements of the Computer Inquiry proceedings, the Bell companies were permitted to do referrals and transfer customers to their separate CPE affiliate. The Commission found this exception appropriate, notwithstanding the Bell companies' local monopoly, both because the Bell companies would be entering the CPE market with no market share, and to avoid customer confusion. Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services By The Bell Operating Companies, 95 FCC.2d 1117, 1149 (1983). Clearly such transfers would be appropriate in this context.

PACIFIC TELESIS
Group

May 9, 1996

P. Gregory Conlon, President
California Public Utilities Commission
505 Van Ness Avenue, Room 5200
San Francisco, CA 94102

Dear President Conlon:

Re: AT&T Ability Jointly to Market Local and Long Distance Services

The purpose of this letter is to follow up on your question concerning AT&T's ability under the '96 Telecommunications Act jointly to market local and long-distance services. I understand that AT&T has represented to you that under the Act its sales representatives may not sell local and long-distance (i.e., interLATA) services on the same telephone call with a customer. If that is what AT&T has told you, I believe it is wrong, and it is certainly inconsistent with what AT&T is telling us.

Under Section 271(e)(1) of the Act, AT&T may not jointly market its interLATA services in California with "telephone exchange services" obtained from Pacific Bell until Pacific's interLATA separate affiliate is authorized to provide interLATA services in California, or until February 9, 1999, whichever is earlier. "Telephone exchange services" obtained from Pacific Bell are those exchange telecommunications services that Pacific Bell is required to make available for resale at wholesale rates under Section 251(c)(4)(A) of the Act -- *i.e.*, services Pacific Bell provides at retail to subscribers who are not telecommunications carriers.

The term "jointly market" is not defined in the Act but we believe the proper interpretation is that it precludes marketing in which, for example, local and interLATA products are bundled or packaged together. But we do not believe the "jointly market" prohibition of 271(e)(1) prevents AT&T -- on a single call -- from selling local and long distance, so long as the products are not bundled together. Thus the Act gives AT&T a big one-stop shopping advantage until our long-distance affiliate is allowed to compete in the interLATA market.

In any event, the 271(e)(1) restriction does not come into play until AT&T starts to resell Pacific Bell's local exchange service. And even that restriction ends when our long-distance affiliate is allowed to provide interLATA service. Moreover, today AT&T is completely unrestricted in its bundling and joint marketing of its long distance services with any local service that AT&T provides over its own facilities or obtains from any provider other than Pacific Bell. As AT&T's General Counsel, John Zeglis, put it to me in a letter of April 1:

> ". . . Section 271(e) only applies after, and to the extent that, a company like AT&T obtains and resells Pacific's retail local exchange services priced at the 'wholesale' discount calculated in accordance with Section 251(c)(4). Because Pacific has not met its obligations in this regard, AT&T cannot possibly be in a position to contravene the marketing limitation in Section 271(e). Concern about AT&T's compliance is thus premature and misplaced -- even if, as you apparently assume, AT&T's plans are confined to resale of Pacific's services under Section 251(c)(4). AT&T's provision of local service by any other means does not implicate Section 271(e)."

Since April 1, when John Zeglis wrote his letter, resale terms have been established and we assume that AT&T will conduct its operations consistently with the Zeglis letter. Thus AT&T can now sell local exchange, intraLATA and interLATA services on a one-stop-shop basis -- we can't.

In sum, if I correctly understand AT&T's representations to you, they are inconsistent with the Act and inconsistent with what AT&T is telling a potential competitor -- Pacific Telesis. I would welcome the opportunity to further discuss these issues with you, should any questions arise.

Very truly yours,

cc: Richard Smith